IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

NO. .....

EDNA ALBRIGHT, WIDOW OF CLAYTON L. ALBRIGHT, DECEASED,

Petitioner,

vs.

THE PENNSYLVANIA RAILROAD COMPANY, A BODY CORPORATE, EMPLOYER AND SELF-INSURER,

Respondent.

BRIEF IN SUPPORT OF THE PETITION.

FACTS.

Petitioner relies upon the facts as set out in the petition.

ARGUMENT.

I.

The Maryland Court of Appeals was in error in holding that the deceased was engaged in interstate commerce within the Federal Employers' Liability Act.

II.

The remedy for this class of employees should not be exclusively under the Federal Act.

These propositions will be considered in order.

I.

The Maryland Court of Appeals was in error in holding that the deceased was engaged in interstate commerce, within the meaning of the Federal Employers' Liability Act.

The Maryland Court of Appeals, in deciding the case at bar, construed the 1939 amendment to the Federal Employers' Liability Act as evidencing a Congressional intent to broaden considerably the Federal Employers' Liability law (R. Appendix, p. 4). It indicated that by virtue of the amendment the Act is extended to all employees of railroads who, *regardless of their normal duties*, are engaged at the time of the injury in work which in any way directly or closely and substantially affects commerce. It is submitted that Congress in the enactment of this amendment, did not attempt to extend it to *any class of employees not theretofore ordinarily covered*, but intended merely to circumvent the effect of the judicial limitation of the original Act to employees only if engaged in interstate commerce *at the time of injury*. This circumspective interpretation was announced by the Supreme Court in the case of *Shanks v. Delaware, L. & W. R. Co.*, 239 U. S. 556, 60 L. Ed. 436, 36 S. Ct. 188 (1915), and when the amendment was passed the Courts had been regarding the activities of an employee *at the time of injury* as conclusive, even though his regular duties were intimately connected with interstate transportation, and if, *at the time of the injury*, he was performing some function not so connected, he was held not to be entitled to the benefits of the Act. 38 *Mich. Law Rev.*, 754, 755. That it was the purpose of this amendment to avoid the necessity of determining the precise character of the employee's work at the instant of the injury and to protect all employees whose *general duties* clearly affected interstate transportation, but who tempo-

rarily and at the moment of injury were engaged in intrastate work, is aptly illustrated in the Report of the Senate Judiciary Committee on this amendment, which states that it

> ". . . is intended to broaden the scope of the Employers' Liability Act so as to include within its provisions employees of common carriers who, *while ordinarily engaged in the transportation of interstate commerce*, may be at the time of injury temporarily divorced therefrom and engaged in intrastate operations.
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> ". . . as to those *who are constantly shifting from one class of service to another*, the adoption of the amendment will provide uniform treatment in the event that injury or death so occurs." (Sen. Rep. No. 661, 76th Cong. 1st Sess. 1939.)[1] (Italics ours.)

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[1] The complete report is as follows:

SENATE REPORT 661, 76TH CONGRESS, 1ST SESSION ON AMENDMENT TO FEDERAL EMPLOYERS' LIABILITY ACT, 45 U. S. C. 51.

"This amendment is intended to broaden the scope of the Employers' Liability Act so as to include within its provisions employees of common carriers who, while ordinarily engaged in the transportation of interstate commerce, may be, at the time of injury, temporarily divorced therefrom and engaged in intrastate operations.

"The question whether an employee, at the time of his injury, is engaged in interstate or intrastate commerce is frequently difficult of determination. Under the rule laid down by the Supreme Court of the United States, an employee of a railroad company who may be injured must be found to have been engaged, at the time of the infliction of the injury, 'in transportation or work so closely related to it as to be practically a part of it' (*Shanks v. D., L. & W. R. R.*, 239 U. S. 556).

"In order to prove interstate transportation, if the question is at all obscure, it is necessary to procure the records of the carrier to show that the train, or the car upon which the employee was working, at the time of injury, contained some commodity, which was being transported in interstate commerce, or, if the car be empty, it is necessary to prove by the records of the company that the car was then en route in an interstate movement.

"As a result of the uncertainty which exists in borderline cases, there have been many instances in which suits were commenced and prosecuted to final determination only to develop the fact that the claimant had chosen the wrong remedy, or sued in the wrong court, and during the acquirement of this information the statute of limitations ran against the claimant under the law applicable to the case and no recovery could be had.

"Railroad men are frequently injured while moving or working upon cars or engines which have been temporarily withdrawn from interstate commerce and which were, just before or just after the

In other words, it was the Congressional intent to "limit the scope of the amendment to employees who are *primarily engaged* in interstate commerce, although they may be 'at the time of injury *temporarily divorced* therefrom and engaged in intrastate operations'." (Italics ours.)

55 *Harvard Law Rev.*, 1212, 1213.

However, there is no indication that the Act was designed to cover employment of such a character as was formerly not regarded as "interstate commerce," as that expression as used in the Federal Act had been interpreted.

Clearly, Congress was without power to extend the Act to include employment of such a nature, as prior to the enactment of the amendment was not "interstate commerce", *First Employers' Liability case*, 207 U. S. 463, 52 L. Ed. 297, 28 S. Ct. 141 (1908),[2] and an examination of the Act as it existed prior to the enactment of the 1939 amendment illustrates that it was broad enough to include employment which *was in fact* interstate commerce. Thus, the conclusion must follow that the sole purpose of the enactment of this amendment was to extend benefits to those persons who although normally engaged in interstate com-

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injury, used in such commerce. In railroad switching service particularly men may be engaged in interstate and intrastate commerce intermittently several times during a single tour of duty.

"The adoption of the proposed amendment will, to a very large extent, eliminate the necessity of determining whether an employee, at the very instant of his injury or death, was actually engaged in the movement of interstate traffic. If any part of the employee's duties (at the time of his injury or death) directly, closely, or substantially affected interstate or foreign commerce, the claimant would be considered entitled to the benefits of the Act.

"The preponderance of service performed by railroad transportation employees is in interstate commerce. As to those who are constantly shifting from one class of service to another, the adoption of the amendment will provide uniform treatment in the event of injury or death while so employed."

[2] See also the Second Employers' Liability Cases, *Mondou v. N. Y., N. H. and H. Ry. Co.*, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169 (1912).

merce *at the time of their injury* were involved in a wholly intrastate transaction.

Consequently, the Maryland Court of Appeals' interpretation of the amendment to include a type of employment hitherto excluded attributes to Congress an intent to extend its control to a class of employees whose activities this Court has held not to constitute interstate commerce as used in the Federal Act.

Heretofore, this Court in determining whether an employee was covered by the Federal Act has stated that the determining factor is a connection to interstate "transportation," as distinguished from "commerce."[3] In accordance with this "transportation" standard, this Court has held that the Act does not cover employees engaged in placing coal in coal chutes, after which it was supplied to locomotives engaged in interstate commerce. *Chicago, B. & Q. R. Co. v. Harrington*, 241 U. S. 177, 60 L. Ed. 941, 36 S. Ct. 517 (1916). Similarly, it has regarded an employee engaged in wheeling coal to heat a shop in which employees were repairing cars that had been and were to be used in interstate commerce, *Ill. Central R. R. Co. v. Cousins*, 241 U. S. 641, 60 L. Ed. 1216, 36 S. Ct. 446 (1915); an employee guarding tools to be used in the construction of a new depot and tracks which would be used in interstate commerce, *New York Central R. R. Co. v. White*, 243 U. S. 188, 61 L. Ed. 667, 37 S. Ct. 247 (1917), and an employee who fired a stationary engine which generated steam to heat a passenger depot and other rooms used for general railroad purposes, *Chicago, N. W. R. Co. v. Bolle*,

[3] It was stated in the case of *Shanks v. Delaware, L. & W. R. Co.*, 239 U. S. 556, 60 L. Ed. 436, 36 S. Ct. 188 (1915), that Congress in adopting the Federal Act used the term "interstate commerce," not in a technical sense but in a practical one better suited to the occasion, (see *Swift & Co. v. U. S.*, 196 U. S. 375, 398, 49 L. Ed. 518, 525, 25 S. Ct. 276) and that the true test of employment in such commerce in the sense intended is, *was the employee at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it?*

284 U. S. 74, 76 L. Ed. 173, 52 S. Ct. 59 (1931), as not being so connected with interstate *transportation* as to be covered by the provisions of the Federal Act. The explanation is well epitomized in the *Bolle* case, *supra*, p. 80, where it was stated that what the employee produced was not use in the *transportation* of anything. The Maryland Court of Appeals, by the language of its opinion which states that *before* the passage of the Act "the employee of the carrier was required to be engaged in duties involving actual transportation," (R. Appendx. p. 4), clearly indicates that it interprets the amendment as discarding "transportation" as the test, in spite of the decisions of this Court and in spite of the fact that the history of the amendment indicates no such Congressional intention.

In accordance with this Court's adoption of the general rule requiring interstate transportation to bring an employee within the terms of the Federal Act, yard watchmen employed by interstate railroad companies have been held as not employed in interstate commerce within that Act. It was held in *Delaware, L. & W. R. Co. v. Scales*, 18 F. (2d) 73 (1927), that a railroad policeman was not subject to the Federal Employers' Liability Act. The Court declared:

> "We take notice of the fact that what are called *railway policemen are creatures of state law.* There is nothing in federal statutes creating them, or giving them authority, allying them officially to interstate commerce. *Their police function is to arrest, pursuant to state law*, offenders against any lawful authority, state or national. But evidently *they have nothing to do with transportation of any kind.* A guard upon a car traveling between states would be in a different position." (Italics ours.)

In the case at bar, the deceased was employed as a special policeman and assigned to duty at the Pennsylvania

Railroad Produce Terminal (R. 11), and in addition was commissioned as a special policeman for the State of Maryland by the Governor of that State (R. 38). Thus, as stated in the *Scales* case, *supra*, he *was* a creature of state law whose function was to guard against and arrest for violations of state law. Certainly, he had nothing to do with transportation. When his duties are compared with those of the employee in the *Harrington* case, *supra*, it is apparent they have even less relation to interstate transportation than did the duties of the employee in that case. Federal and State authorities are in harmony with the *Scales* case and have held that yard watchmen were not within the Federal Act.

Thomson v. Industrial Commission, 380 Ill. 386, 44 N. E. (2d) 19 (1942), Cert. Den. 318 U. S. 755;

Feaster v. Southern R. R. Co., et al., 15 F. (2d) 540 (1926);

Califore v. Chicago, St. P., M. & O. Rlwy. Co., 220 Iowa 676, 263 N. W. 29 (1935);

Southern Railway Co. v. Varnell, 222 Ala. 237, 131 So. 803 (1930), Cert. Den. 283 U. S. 852;

Grand Trunk Western Rlwy. v. Industrial Commission, 291 Ill. 167, 125 N. E. 748 (1920);

Chicago & Alton R. R. Co. v. Industrial Commission, 290 Ill. 599, 125 N. E. 378 (1919);

Hardy v. Atlanta & West Point R. R. Co., 20 Ga. App. 363, 93 S. E. 18 (1917);

Chicago, Rock Island & Pacific Railway v. Industrial Board, 273 Ill. 528, 113 N. E. 80, L. R. A. 1916 F. 540 (1916).

From the nature of the duties of the deceased, it is manifest that nothing he did in the performance thereof affected or contributed to interstate transportation. If, as held in the *Harrington* case, *supra*, the placing of coal in

chutes from which it was fed to engines engaged in interstate commerce, is not employment of such a nature as to come within the Federal Act, then clearly the mere guarding of cars in a terminal, as incident to guarding all the property within that terminal, has no such definite relationship to interstate transportation as to bring such employment within the terms of that legislation.

In the case of *Thomson v. Industrial Commission, supra*, decided by the Supreme Court of Illinois in 1943 and in which the 1939 amendment was considered, the watchman injured while patroling the railroad property had duties which were almost identical to those of the deceased in the case at bar,[4] except that in addition to his duties of examining and testing seals on cars and guarding their contents *he was also required to inspect passing trains, both interstate and intrastate*, for hot boxes and other defects and *observe the tracks for broken rails and obstructions.* The Court, in upholding his right to recover under the State Compensation Act, declared that he "was employed to patrol and protect his employer's property. The fact that he was employed by an interstate carrier does not change the local nature of his employment, or subject all of his activities to congressional regulation."

> "At the time of the injury, Stoll was engaged in the prevention of a violation of the laws of Illinois—a

[4] Stoll, the deceased, had entered the employ of the Railway Company in 1933, as a patrolman and worked in that capacity until the date of the injuries for which he claimed and was awarded compensation under the State law. The opinion states at p. 387: "As patrolman, it was his duty to patrol the railroad right of way in his district, look out for fires, eject or arrest trespassers, examine and test seals on cars (both interstate and intrastate) and protect the cars and their contents from thieves and trespassers. It was also his duty to inspect passing trains (both interstate and intrastate) for hot boxes and other defects, and observe the tracks for broken rails and obstructions. His duties were primarily those of a policeman. He worked under the direction of the captain of the railroad police." While attempting to arrest a trespasser, two other men attacked him and pushed him off a twenty foot high viaduct causing the injuriees for which he sought compensation.

simple trespass on the right of way. The fact that interstate commerce might be moved over the tracks of that right of way, did not lend an interstate aspect to his acts or place him in interstate commerce."

The award made by the Maryland State Accident Commission was in effect a finding of fact that the deceased was not engaged in interstate commerce. It was stated in *Lawrence v. Rutland Railroad Company*, 112 Vt. 523, 28 A. 2d 488, Cert. Den. 317 U. S. 683, that the finding of the State Industrial Accident Commission that an injured employee was not engaged in interstate commerce is a finding of fact and that the award must stand if the facts fairly and reasonably tended to support it.

In the case at bar the record shows clearly that the deceased had nothing to do with the loading, moving or shifting of the cars, but had only the duty of patroling the premises (R. 13). Clearly, these facts coupled with the fact that he was employed as a special policeman (a class of employees who have been held as not engaged in interstate commerce within the Federal Act) *reasonably* support the finding of the Commission.

II.

The remedy for this class of employees should not be exclusively under the Federal Act.

It is true that this Court in the case of *New York Central R. R. Co. v. Winfield*, 244 U. S. 147, 61 L. Ed. 1045, 37 S. Ct. 546 (1917), decided that if an employee was entitled to bring an action under the Federal Act, his remedy thereunder was exclusive. In that case, however, the duties of the employee were closely and substantially connected with interstate commerce and there was no question that he was so engaged therein, he being employed as a laborer

in the repair of the railroad's main track.[5] This Court, however, has recognized that in certain cases there is no well defined line for determining the character of a man's employment and very recently it has declared in the case of *Davis v. The Department of Labor and Industries of the State of Washington*, 317 U. S. 249, 87 L. Ed. 175, 63 S. Ct. 225 (1942), that there is "clearly a twilight zone in which the employees must have their rights determined case by case and in which particular facts and circumstances are vital elements."

This opinion has been interpreted as signifying that persons in this twilight zone may have remedies under either a State Act or a Federal Act. (See the dissent of the Chief Justice, 317 U. S. at p. 260.)

In determining the rights of those persons in this twilight zone, the Court held that it "must give great—indeed, presumptive—weight" to the state statutes involved. Thus, in the *Davis* case, *supra*, in making this factual judgment, the Court relied heavily on the presumption of constitutionality in favor of the state statute. Furthermore, the Maryland State Workmen's Compensation Act provides that in the absence of substantial evidence to the contrary,

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[5] Mr. Justice BRANDEIS in a vigorous dissent concurred in by Mr. Justice CLARK, urged that the states should not be denied a right to have their own local laws applied to railroad employees. He stated that

> "The subject of compensation for accidents in industry is one peculiarly appropriate for state legislation. There must, necessarily, be great diversity in the conditions of living and in the needs of the injured and of his dependents according to whether they reside in one or the other of our States and Territories so widely extended. In a large majority of instances, they reside in the State in which the accident occurs. Though the principal that compensation should be made, or relief given is of universal application, the great diversity of conditions in the different sections of the United States may, in a wise application of the principle, call for differences between States, in the amount and method of compensation, the periods in which payment shall be made, and the methods and means by which the funds shall be raised and distributed. The field of compensation for injuries appears to be one in which uniformity is *not* desirable, or at least not essential to the public welfare."

it shall be presumed that a claim comes within the State Act.[6] A similar provision is contained in the New York Workmen's Compensation Act which this Court has declared constitutional. *New York Central R. R. Co. v. White, supra.*

It was clearly the intention of Congress in enacting the Act in question to confer *benefits* on railroad employees and not to impose any burdens upon them.[7] Consequently, even though it be assumed that the Maryland Court of Appeals was correct in its view that the 1939 amendment brought within the Act employees whose general duties were such that prior to its passage they would not have been included, the wording of the amendment illustrates that it was the primary intention to confer *benefits* and not to deprive employees of a recovery which they formerly would have enjoyed and thus in harmony therewith, they should not become virtually devoid of a remedy. Chief Justice Moffatt of the Supreme Court of Utah in 1939 urged that employees who are unable to prove that their injuries resulted from the negligence of the employer be allowed to recover under a State Compensation law.[8]

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[6] Art. 101, Sec. 79, Maryland Annotated Code (1939).

[7] President Roosevelt in urging the enactment of the First Federal Employers' Liability Act, declared:

> "The practice of putting the entire burden of loss of life or limb upon the victim or the victim's family is a form of social injustice in which the United States stands in unenviable prominence. . . . I urge upon Congress the enactment of a law which will at the same time bring federal legislation up to the standard already established by all the European countries, and which will serve as a stimulus to the various states to perfect their legislation in this regard."

See 42 *Cong. Rec.* 73 (1907).

[8] See the dissent of the Chief Justice in the case of *Harrington, et al., v. The Industrial Commission*, 96 Utah 544, 558-559, where he states:

> "Before the Federal Employers' Liability Act is applicable to one engaged in an employment two elements must concur: (1) That the employee must be engaged in interstate commerce. (2) That the employer was negligent. So if the employer was not negligent and the injury arose out of or in the course of the employment why should the courts or national Congress say or attempt to say that the state might not be permitted to allow the injured or his dependents something to relieve his or their suffering, loss of earning

The view is adopted in 55 *Harvard Law Review*, 1212 1213, that if the Act is extended by the amendment and the remedy held exclusive, then a hardship is worked on employees who would have recovered prior thereto under State Workmen's Compensation Acts which, as opposed to the Federal Act, generally require no proof of negligence on the part of the employer.

This is especially true in cases involving injuries to watchmen at terminals, the very nature of whose duties involve hazards which result in injuries in no way traceable to the negligence of the employer. The watchman is in fact employed for the specific purpose of preventing results to others for which the railroad company would be held negligent in not avoiding. The character of his duties differs materially from that of the ordinary employee *within the act* whose duties are intimately connected with the movement of traffic and who in the exercise of due care will ordinarily not sustain injury except in those cases where the employer *is* guilty of negligence. Thus, except for the most unexpected and unusual case, it is difficult to imagine that injuries sustained by a watchman *in the course of his duties* would ever be traceable to his employer's negligence and yet it is apparent, when the

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capacity or resultant dependent condition under a state law or to provide for the support or maintenance of its injured or incapacitated citizens?

"The burden of caring for dependents, the crippled, maimed, or incompetents rendered so because of industrial accidents and injuries is essentially a state burden. That the Congress of the United States could provide for the care of those whose incapacities arise out of activities in interstate commerce may be granted. At the present time, it has not been done. When, however, we get one step farther removed and have to deal with injuries for which the employer is not responsible as in cases like the present one (interstate commerce but no negligence) and the responsibility rests upon a third party who is or may be unable or unwilling to respond the irony of the situation becomes intense. Under the exclusive construction given the Federal Employers' Liability Act the protection provided by the employer and the state is denied the injured employee and his dependents. Thus a protective measure becomes a weapon barring the relief that should be given."

ordinary risks of the employment are considered, that injuries will be *frequent*. Therefore, to hold that a watchman's recovery is dependent on his ability to prove negligence would be most prejudicial to this class of employees, and for the most part would leave them with no remedy for injuries sustained and would leave watchmen as a class in that same deplorable position of having the entire burden of loss of life or limb placed upon the victim or the victim's family, which was regarded as such a form of social injustice as to promote the passage of the Employers' Liability Act in an endeavor to eliminate such an undesirable situation.

In conclusion, it is urged that because Section 79 of the Maryland Workmen's Compensation Act provides that in the absence of substantial evidence to the contrary it shall be presumed that the claim comes within the provisions of the State Act, and because this Court in the *Davis* case, *supra*, stated that great and indeed presumptive weight is to be given to State Statutes, the Petitioner should not be barred from recovering under the State Workmen's Compensation Act.

It is, therefore, respectfully prayed that this petition for a writ of certiorari be granted.

Respectfully submitted,

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